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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CASTEEN CONSTRUCTION, INC., Plaintiff and Respondent, v. FARWEST AMERICAN ENTERPRISES, LTD. et al., Defendants and Appellants.	D053256 (Super. Ct. No. GIC856569)

APPEAL from a judgment of the Superior Court of San Diego County, Jay Bloom, Judge. Affirmed in part; reversed in part; remanded with directions.

I

INTRODUCTION

Crane Development Corporation (Crane) entered into a contract with defendant Farwest American Enterprises, Ltd. (Farwest), the owner, to serve as the general contractor for a series of attached residences known as Summerwind Village (the Project). Plaintiff Casteen Construction, Inc. (Casteen) entered into a subcontract with

Crane to construct the framing on the project. Casteen encountered various delays in building the Project and had to replace a series of roof trusses that Casteen had ordered for the Project pursuant to Farwest's request. Casteen submitted two requests for change orders to Crane in which it sought compensation for the costs associated with the delays and for the cost it incurred to replace the roof trusses. After Casteen finished its work on the Project and learned that neither Farwest nor Crane would compensate it for the costs identified in the requested change orders, Casteen filed a stop notice and a mechanics' lien. Defendant American Contractor's Indemnity Company (ACIC) posted two release bonds for the purpose of securing Casteen's mechanics' lien and stop notice claims.[1]

Casteen subsequently filed this action against Crane, Farwest, Farwest's representative, Don Jack, International City Bank, which is the financial institution that

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1 A mechanics' lien is a lien on real property given to persons who have performed labor or furnished materials or equipment contributing to the improvement on the property. (See Civil Code, § 3110.) An owner of property subject to a mechanics' lien may post and record a release bond, which transfers the claim of lien from the owner's land to the bond. (*Hutnick v. U.S. Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 462.)

"A 'stop notice' is a remedy to reach unexpended construction funds in the hands of the owner or lender . . . and may be served by a claimant other than an original contractor." (*National Technical Systems v. Commercial Contractors, Inc.* (2001) 89 Cal.App.4th 1000, 1006.) "Like a mechanic's lien release bond . . . , a stop notice release bond . . . acts as a substitute fund to satisfy an outstanding claim. Just as the mechanic's lien release bond replaces the liened property, the stop notice release bond replaces the funds in the possession of the owner, construction lender, or source of construction payment." (*Grade-Way Constructin Co. v. Golden Eagle Ins. Co.* (1993) 13 Cal.App.4th 826, 832.)

lent funds to complete the project, and ACIC.[2] In a third amended complaint, Casteen brought a quantum meruit cause of action against Farwest. As to Farwest and ACIC, Casteen also sought enforcement of the release bonds.[3] After a bench trial, the trial court found in favor of Casteen on its quantum meruit claim, and awarded Casteen delay damages, and damages for the costs of replacing the trusses. The court awarded Casteen a total of $88,238 in damages on its quantum meruit claim against Farwest. The trial court also determined that Casteen's quantum meruit recovery supported an award of $88,238 against both defendants on the release bonds.

On appeal, defendants claim that the trial court erred in awarding Casteen delay damages and damages for the cost of replacing the trusses pursuant to Casteen's quantum meruit claim. Defendants also claim that the trial court erred in concluding that Casteen's quantum meruit recovery supported an award against the release bonds.

With respect to Casteen's quantum meruit claim, we conclude that the trial court erred in awarding Casteen delay damages, but that the trial court properly awarded

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2 All of Casteen's claims against Crane, Jack and International City Bank were dismissed prior to trial and Crane, Jack, International City Bank are not parties to this appeal. We use the term "defendants" in this opinion to refer to Farwest and ACIC.

3 Casteen's third amended complaint included claims against Crane, Farwest, Jack, ACIC, the manufacturer of the trusses at issue in the case, Trussway, Farwest's architect on the Project, Earl Arnold, and the engineering firm that prepared plans and specifications for the project, Concorde Consulting Group, Inc. As with Crane, Jack, and International City Bank, all of Casteen's claims against Trussway, Arnold, and Concorde Consulting Group, Inc. were dismissed prior to trial, and none of these entities or persons are parties to this appeal. The third amended complaint included several claims against Farwest that are not relevant to this appeal.

Casteen damages for the cost of replacing the trusses. We further conclude that the trial court must recalculate the amount of damages on Casteen's quantum meruit claim, in light of these holdings. With respect to Casteen's claims as to the release bonds, we conclude that the trial court must recalculate the amount that Casteen is entitled to recover on the bonds so as to equal the damages that the trial court determines Casteen is entitled to on its quantum meruit claim. Accordingly, we affirm the judgment in part, reverse the judgment in part, and remand the matter with directions.

II

PROCEDURAL BACKGROUND

A. *Casteen's claims*

In November 2005, Casteen filed the initial complaint in this action. In January 2007, Casteen filed the operative third amended complaint, which contained a quantum meruit claim against Farwest. Casteen also sought enforcement of the mechanics' lien release bond and the stop notice release bond against both Farwest and ACIC. The third amended complaint included other claims that are not relevant to this appeal.

B. *The trial court's resolution of Casteen's claims and the defendants' appeal*

In February 2008, the trial court held a bench trial on Casteen's claims. In March 2008, the trial court issued a tentative statement of decision. After receiving objections and requests for additional findings from both parties, the trial court issued its statement of decision.[4] In its statement of decision, the trial court concluded that Casteen was

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4 Casteen's objections are not contained in the record on appeal.

entitled to prevail on its quantum meruit claim against Farwest, in the amount of $88,238. The trial court also stated that Casteen was entitled to recover $88,238 as to both Farwest and ACIC on its claims for enforcement of mechanics' lien and its stop notice claim.

In June 2008, the trial court entered judgment against Farwest on Casteen's quantum meruit claim in the principal sum of $88,238.[5] The judgment provides that Casteen is entitled to recover on its mechanics' lien and stop notice claims against both defendants in the amount of $88.238.

Defendants timely appeal.

III

DISCUSSION

A. *The damages on Casteen's quantum meruit claim*

Defendants claim that the trial court erred in awarding Casteen delay damages and damages for costs it incurred to replace the trusses on the Project.

1. *Factual background*

a. *Evidence pertaining to delay damages*

Casteen's owner, Ellis Casteen (Ellis), testified regarding a meeting that occurred during construction of the Project, which Ellis, Mike Stafford (Crane's field superintendent), Don Jack (Farwest's representative), and Rob Rhodes (Casteen's field

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[5] The trial court reduced this amount by $11,454 due to prior settlements with various codefendants. These reductions are not at issue on appeal.

superintendent) attended.[6] According to Ellis, the focus of the meeting was "the best way to stop proceeding at a snail's pace and, to the benefit of everybody, move forward on this project, to get past all these design flaws." Ellis explained that someone had suggested that the sequence of the construction be changed, such that Casteen would focus on constructing only one building at a time, rather than attempting to construct several buildings at once.[7] Ellis explained that the theory underlying the proposed change was "to try to iron out all the issues so we could move through the other buildings more quickly." Ellis testified that he understood at the time of the meeting that the proposed approach would increase Casteen's production costs, explaining: "[W]e had planned to be on at least three buildings all the time. I mean, to slow down and just try and focus on one building was going to add weeks to the contract."

Ellis testified that Jack was "initially opposed to slowing down." Ellis explained, "He was always wanting to move forward more quickly. But then after we explained to him it may seem slow at first, but, you know, it would help us to get to a point where the rest of — we had nine more buildings to construct. And it would put us in a position of success just a few weeks down the road, if he'd allow it."

With respect to the costs of the revised construction schedule, Ellis testified as follows:

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6 Ellis did not further identify the approximate date of the meeting, other than to agree with plaintiff's counsel that the meeting occurred "at some point."

7 When asked by plaintiff's counsel whether he recalled who made the suggestion, Ellis testified, "I think it might have been our field superintendent."

> "[Plaintiff's counsel]: And at the time of the meeting, did you inform anyone there that you anticipated that Casteen's costs would increase?
>
> "[Ellis]: Yes.
>
> "[Plaintiff's counsel]: What did you say in that respect?
>
> "[Ellis]: I told [Jack] that it would take some additional moneys for us to man the job and only operate on one building. That's not something we had put into our budget or proposal.
>
> "[Plaintiff's counsel]: Did you state that you expected Casteen to be paid for those costs?
>
> "[Ellis]: Absolutely.
>
> "[Plaintiff's counsel]: And what response did you receive to that statement?
>
> "[Ellis]: I was told that wouldn't be a problem.
>
> "[Plaintiff's counsel]: And who told you that?
>
> "[Ellis]: Both Don Jack and eventually Ray Fletcher from Crane."[8]

Ellis explained that after the meeting, Casteen focused on constructing only the first building, which took "many weeks."

After completing construction on the first building, Ellis wrote a letter to Fletcher in response to Fletcher's request that Casteen "bill him for an amount that [Casteen] thought [it was] due for the project delays." In the letter, Ellis wrote, in pertinent part:

> "Now that the final slab is ready for framing we know exactly how many weeks the numerous design flaws and the concrete issues ha[ve] delayed this project. We cannot be expected to absorb this kind of undue expense. I believe that the only reason this project is still alive is because of the time [and] efforts Casteen and Crane employees have put into correcting the design team[']s mistakes. I

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8 Fletcher served as the project manager for Crane.

> know Don [Jack] will not like this but again, we cannot be expected to absorb this kind of expense."

Ellis submitted a request for a change order seeking $119,252.80 with his letter.

Fletcher faxed Ellis a response in which he disputed some of the proposed charges, and requested that Ellis submit a revised potential change order in the amount of $57,229.70. Ellis responded to Fletcher with a letter stating that he was "willing to accept [Fletcher's] proposed amount with one exception." Ellis requested that Fletcher adjust the amount to add $2,565, for a total of $59,794.70. Casteen also sent Fletcher a revised potential change order, entitled "Potential Change Order 23," (formatting omitted) in the amount of $59,794.70.[9]

In describing this process on cross-examination, Ellis testified:

> "Again, . . . this was a negotiation. He [Fletcher] specifically asked me to present him with a change order for what I thought was fair, a fair amount of time and a fair cost for the circumstances of the job and of the conditions of the plans. [¶] And I presented him with a change order. He came back and asked me to make some changes. And I went back to him and argued that some of the things he was asking for I didn't think were correct. And we settled ─ after, you know, not just one e-mail but several e-mails we settled on a value. And that's the value that I billed for."

Potential Change Order 23 identifies Ellis as its "[o]riginator" and Fletcher as its "[t]arget." The subject header states, "Delay Costs." Under a subheading entitled "Explanation," the following text appears:

> "The following are weekly costs associated with the constant delays we have encountered. The original schedule reflected phase one foundations being poured and available over a two week period.

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[9] Ellis described the potential change order as follows, "23 was the agreed upon amount that Crane and I reached for the additional cost on the project."

> Today we begin our 17th week and the sixth foundation is finally ready for construction. The first three buildings are fairly complete. We are now on a three phase schedule."

Under a subheading marked "Material & Equip Costs," is the following:

> "One Superintendent @ $1300/week = $13,000.00
>
> "One Lead Man @ $900/week = $9,000.00
>
> "On Laborer @ $440/week = $4,400.00
>
> "One Pettybone Driver @ $800/week = $8,000.00
>
> "Workers Compensation & Taxation @ 43% = $14,792.00
>
> "Pettybone & Fuel @ $540/week = $5,400.00
>
> "Profit & Overhead @10% = $5,202.70
>
> "Total = $59,794.70"

In summarizing the basis for Casteen's claim for damages associated with delay, Ellis testified: "[I]f they had told me early during the project that they weren't going to pay me for the delays I was experiencing on the job because of all of the design flaws, then I would have said, 'You guys figure out the problems. And when you're ready for me to come back, I'll come back and do the work." Ellis also testified, "[M]y biggest issue . . . is if they had told me when I was asking for the delay cost, they weren't going to pay it, then I would have taken some other action. I wouldn't have stayed out on the job. I wouldn't have played a huge part in resolving all of these design flaws. I would have let [Jack] rely more on his design team. And I would have gone back to the project when they were ready for me."

b. *Evidence pertaining to the cost of replacing the trusses*

Prior to Casteen's bid on the Project, Farwest had a company called Stone Truss produce a set of roof truss drawings (the Stone Truss drawings). The Stone Truss drawings depicted vaulted ceilings in many of the units in the Project. Farwest later provided Casteen with a set of plans for the Project on which Casteen based its subcontractor framing bid (the bid set plans). The bid set plans contained a series of roof truss layout sheets that identified the location and quantity of each type of roof truss necessary to complete the project. The roof truss layout sheets were developed from the Stone Truss drawings. However, the Stone Truss drawings were not included with the bid set plans that Farwest gave to Casteen. Casteen's vice president, Jeffrey Soden, testified that he reviewed a set of plans for the Project that had been approved by the City of San Diego (the permitted set plans), together with the bid set of plans. According to Soden, the permitted plans contained no changes from the bid set plans that would affect the construction of the roof trusses. Neither the bid set plans nor the permitted set plans that were offered in evidence at trial included a copy of the Stone Truss drawings.

Ellis testified that Farwest's architect approved a set of shop drawings for roof trusses for the project. Pursuant to that approval, Casteen ordered roof trusses to be manufactured as depicted in the approved shop drawings. The trusses conformed to the plans in the bid set and the permitted set. When the trusses were delivered to the jobsite, Farwest rejected the trusses. Jack, Farwest's representative, indicated that the trusses that were delivered did not include all of the vaults depicted in the Stone Truss drawings.

Jack told Ellis to replace the trusses and assured Ellis that he would pay for the replacement trusses.

Potential Change Order 19 identifies Ellis as its "[o]riginator" and Fletcher as is its "[t]arget." The subject header states, "Replacement trusses for 10 buildings to vault ceilings per owner's request." Under a subheading entitled "Explanation," is the following text:

> "Despite the shop drawing review process, the ceilings in the upstairs of each buildings were not vaulted as the owner described to a truss company not involved in the construction of this project. Per the owners direction, vaulted trusses were ordered to replace the approved, non-vaulted trusses already manufactured."

Under a subheading marked "Material & Equip Costs," is the following:

> "Total Material Add = $34,544.00"

c. *The trial court's statement of decision*

In its statement of decision, the trial court concluded that Casteen was entitled to prevail on its quantum meruit claim against Farwest. The court reasoned in part:

> "There is substantial credible evidence that Mr. Jack acting for Farwest wanted the trusses changed after the project started and this is what he and Farwest received. Mr. Casteen and Mr. Soden were very credible on this issue. By contrast, the court did not find Mr. Jack credible on this issue at all. Plaintiff ended up paying for these trusses in addition to the prior materials. Thus, plaintiff suffered a det[ri]ment and defendant received a benefit. Similarly, as to the delay damages, plaintiff competently established it had to expend funds over and above the contract price to complete the job because of truss changes and other delays, while defendant benefited from the completion of the job. Thus, plaintiff is entitled to recover under the theory of quantum meruit. The defense argues quantum meruit does not apply where there is an existing contract. While there may have been a contract between plaintiff and Crane, there was no

> contract between plaintiff and Farwest. Thus, this theory does not preclude recovery.
>
> "The net loss suffered by plaintiff under these circumstances is $88,238.00. Plaintiff is thus awarded this sum.
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> "Defendants argue, however, that as a general rule a subcontractor may not recover in quantum meruit against an owner. [Citations.] However, these cases are based on a lack of direct contract or involvement between the subcontractor and the owner. These cases are therefore distinguishable. Here, there was a direct contractual relationship between Farwest and the plaintiff which supports the finding against Farwest. [Citation]."

2. *The elements of a quantum meruit claim*

" 'Quasi-contract' is simply another way of describing the basis for the equitable remedy of restitution when an unjust enrichment has occurred. Often called quantum meruit, it applies '[w]here one obtains a benefit which he may not justly retain. . . . The quasi-contract, or contract "implied in law," is an obligation created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money.' [Citation.]" (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388.)

In *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243 (*Day*), the court outlined the elements of a quantum meruit claim:

> "[I]n order to recover under a quantum meruit theory, a plaintiff must establish *both* that he or she was acting pursuant to either an *express or implied request* for such services from the defendant *and* that the services rendered were *intended to and did benefit* the defendant. One court summarized the rule as follows: 'The theory of quasi-contractual recovery is that one party has accepted and retained a benefit with full appreciation of the facts, under circumstances making it inequitable for him to retain the benefit without payment of its reasonable value.' [Citations.]

> "The importance of the 'benefit' part of the rule was stressed in a recent decision by one of our sister courts, *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, [78 Cal.Rptr.2d 101] (*Maglica*): 'The classic formulation concerning the measure of recovery in quantum meruit is found in *Palmer v. Gregg* [(1967)] 65 Cal.2d 657 [661] [56 Cal.Rptr. 97, 422 P.2d 985]. Justice Mosk, writing for the court, said: "The measure of recovery in *quantum meruit* is the reasonable value of the services rendered *provided* they were of direct benefit to the defendant." [Citations.] [¶] . . . [¶] The idea that one must be *benefited* by the goods and services bestowed is thus integral to recovery in quantum meruit; hence courts have always required that the plaintiff have bestowed some benefit on the defendant as a prerequisite to recovery. [Citation.]' (*Maglica, supra,* 66 Cal.App.4th at pp. 449-450.
>
> "The second prong is that there must be either an explicit or implicit request for the services. As one court framed this requirement: '[A] recipient of services performed either requested or acquiesced in them. . . .' [Citation.] Indeed, when the services are rendered by the plaintiff to a third person, the courts have required that there be a specific request therefor from the defendant: '[C]ompensation for a party's performance should be paid by the person whose request induced the performance.' [Citations.]" (*Day, supra*, at pp. 248-249.)

In *Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453, 458 (*Huskinson*), the Supreme Court stated, "Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' [Citation.]" Therefore, according to the *Huskinson* court, a party seeking to prevail on a quantum meruit claim for services provided must establish that "the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made [Citations]." (*Ibid*.)

3. *Application*

a. *The doctrine of judicial estoppel does not preclude Casteen from claiming that it incurred the costs identified in the potential change orders at the request of Farwest*

Prior to Casteen and Crane's settlement, Crane filed a motion for summary judgment or in the alternative, summary adjudication. In a declaration offered by Ellis in opposition to Crane's motion, Ellis stated, "CRANE informed CASTEEN that the Owner did not want to pay CRANE for certain PCO's [potential change orders] that CASTEEN had already fully performed *at the request of CRANE,* including PCO No. 19 dated June 28, 2004 for replacement trusses in the amount of $34,544.00 and PCO No. 23 for costs associated with delays and schedule interruptions." (Italics added.) In its briefing on appeal, defendants claim that in light of the italicized portion of Ellis's declaration, Casteen may not recover damages on its quantum meruit cause of action because the doctrine of judicial estoppel precludes Casteen from claiming that it incurred the costs memorialized in potential change orders 19 and 23 *at the request of Farwest*.

While this appeal was pending, Casteen filed a motion in this court to strike the Ellis declaration from the record. In its motion, Casteen asserts that "[defendants] never offered the [Ellis] [d]eclaration for any purpose at trial." In opposing the motion to strike, defendants do not dispute this assertion. Further, while characterizing Ellis's declaration as a "judicial admission[] of fact," defendants provide no authority, and we are aware of none, that would require a reviewing court to consider for the first time on appeal a document that purports to establish a judicial admission of fact. We therefore

conclude that we may not consider Ellis's declaration in resolving the issues in this appeal. We further conclude that the trial court's quantum meruit damage award is not subject to reversal on the basis of the doctrine of judicial estoppel.

California Rules of Court, rule 8.124(b)(1)(B) provides that an appellant's appendix must contain "[a]ny item listed in rule 8.122(b)(3)[10] that is necessary for proper consideration of the issues." California Rules of Court, rule 8.124(b)(2)(A) provides that an appellant's appendix must not "[c]ontain documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues." In light of our conclusions that we may not consider Ellis's declaration in resolving the issues presented on appeal, and that we may not reverse the judgment on the basis of the doctrine of judicial estoppel, we grant Casteen's motion to strike the declaration from the appellant's appendix. Further, we disregard any references to Ellis's declaration in the briefing on appeal.

b. *The delay damages*

(i) *Consequential damages for delay may not be recovered pursuant to a quantum meruit cause of action*

Defendants claim that, as a matter of law, damages for delay may not be recovered on a quantum meruit claim. This claim raises a question of law, which we review de novo. (See e.g., *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800-801.)

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10 California Rules of Court, rule 8.122(b)(3) pertains to documents that must be contained in a clerk's transcript.

Generally speaking, the term "delay damages," refers to consequential damages recoverable on a breach of contract claim that stem from the defendant's delay in performing its contractual obligations. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 906 [describing "delay damages" as "damages for delay in the commencement of the defendant's performance"]; accord *Lambert v. Superior Court* (1991) 228 Cal.App.3d 383, 389 [stating that mechanic's lien statute "does not permit a lien for delay damages," because "[t]he function of the mechanic's lien is to secure reimbursement for services and materials actually contributed to a construction site, not to facilitate recovery of consequential damages"].) In the context of construction litigation, a contractor may attempt to recover "damages . . . for delay — i.e., amounts compensating the contractor for business disruption, lost profits, etc. . . ." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2008) ¶ 6:3234, p. 6I-46 (the Rutter Treatise); see also 6 Bruner & O'Connor, Construction Law (2009) § 19:52.55 ["An owner's delay damages are often in the form of such common consequential damages as loss profits and other loss of use damages. To a contractor, however, an extended job means that personnel and equipment are utilized more than anticipated"].)[11]

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11 In its respondent's brief, Casteen quotes this definition of damages for delay, which is from the Rutter Treatise, and claims that these are "[c]learly . . . not the type of damages sought by Casteen." However, in Potential Change Order 23, Casteen sought costs associated with "Profit & Overhead." Casteen's vice president testified at trial that Casteen's construction "flow" was "disrupted" by problems related to the plans for the Project. Thus, it is far from clear whether Casteen was seeking delay damages distinct from the type of delay damages described in the Rutter Treatise. We conclude that we may not affirm the trial court's award of delay damages as such damages are ordinarily conceptualized in the law. We consider in part III.A.3.b.ii., *post*, Casteen's contention

As applied to this case, we agree with defendants that Casteen was not entitled to recover delay damages associated with Farwest's breach of contractual obligations with Casteen because, as the trial court found, "there was no contract between plaintiff and Farwest." We also agree with defendants that delay damages, conceptualized as consequential damages provided to compensate a party for the increased costs of performing its contractual obligations, are not recoverable in quantum meruit as a matter of law, given the restitutionary nature of quantum meruit relief, which allows the plaintiff to recover only for its services that resulted in an direct benefit to the defendant.

(ii) *The record lacks substantial evidence to affirm the award of delay damages as reflecting the reasonable value of services provided by Casteen*

Having concluded that Casteen may not recover delay damages in a quantum meruit cause of action, as those damages are ordinarily conceptualized in the law, we must consider Casteen's contention that the record contains substantial evidence to affirm the trial court's award of delay damages as reflecting the reasonable value of services that it provided to complete the Project.

" 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citation] . . . Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. [Citations.] [¶] . . . [¶] The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the

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that the record contains substantial evidence to affirm the award of delay damages as reflecting the reasonable value of services that Casteen provided to complete the Project.

whole record. [Citation.]" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-652.)

In its statement of decision, the trial court did not cite to any evidence of damages incurred by Casteen to support the court's award of delay damages. Further, the record contains no evidence linking the additional costs that Casteen claimed to have incurred as a result of the revised construction schedule to a benefit conferred upon Farwest. Nor does the record contain any evidence that the approximately $60,000 in costs that Ellis "settled" on after his "negotiation" with Fletcher, Crane's project manager, bore any relationship to the reasonable value of additional services that Casteen provided to Farwest. While Casteen asserts in its brief that the delay damages contained in Potential Change Order 23 reflected "additional costs needed to work out design solutions," the record contains no evidence demonstrating that this is so. For example, there is no evidence to demonstrate how Farwest benefitted from the $5,202.70 in "profits and overhead" or from $14,792.00 in "workers' compensation and taxation" that Casteen sought by way of Potential Change Order 23. (See *Iraola & CIA, S.A. v. Kimberly-Clark Corp*. (11th Cir. 2003) 325 F.3d 1274, 1282 (["Quantum meruit claims measure the value of services to the recipient, rather than the costs to the provider, and therefore [plaintiffs'] alleged lost profits and costs are not recoverable"].) In short, Casteen failed to demonstrate at trial that the money it sought by way of Potential Change Order 23 reflected the reasonable value of services rendered to Farwest that provided a direct benefit to Farwest. (*Day, supra,* 98 Cal.App.4th at pp. 248-249 [quantum meruit

recovery includes only the "reasonable value of the services rendered *provided* they were of direct benefit to the defendant"].)

Accordingly, we conclude that there is not substantial evidence in the record to support the trial court's award of delay damages pursuant to Casteen's quantum meruit claim.[12]

c. *The damages for the cost of replacement trusses*

Defendants raise several arguments in support of their claim that the trial court erred in awarding Casteen damages for the cost of replacement trusses.

(i) *Casteen's subcontract with Crane does not preclude it from prevailing on its quantum meruit claim against Farwest*

Defendants argue that Casteen may not recover on its quantum meruit claim as a matter of law because, pursuant to *Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 719 (*Truestone*) and *Rogers v. Whitson* (1964) 228 Cal.App.2d 662 (*Rogers*), Casteen's entitlement to the costs of replacing the trusses is wholly governed by its subcontract with Crane. Defendants' contention raises a question of law, which we review de novo. (See e.g., *Ghirardo v. Antonioli*, *supra*, 8 Cal.4th at pp. 800-801.)

In *Truestone*, a property owner (Atoian) entered into a construction contract with Vista. Vista purchased certain construction materials from Truestone that were used on the project. Vista allegedly failed to pay for the materials. Truestone filed suit against Vista and Atoian. As to Atoian, Truestone alleged several claims, including unjust

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12 In light of this conclusion, we need not consider defendants' additional contentions in support of reversal of the delay damage award.

enrichment. The trial court granted Atoian's motion for summary judgment. (*Truestone, supra,* 163 Cal.App.3d at pp. 718-721.)

On appeal, in reviewing the propriety of the trial court's ruling that Atoian was entitled to judgment as a matter of law on Truestone's unjust enrichment claim, the *Truestone* court noted that in *Earhart v. William Low Co*. (1979) 25 Cal.3d 503, a contractor was entitled to recover on an unjust enrichment claim because the defendant made an "express promise to pay the contractor. . . ." (*Truestone, supra,* 163 Cal.App.3d at p. 724.) In contrast, the *Truestone* court noted that Truestone's complaint contained "no allegation that Atoian promised to pay Truestone, or that Atoian did not pay Vista." (*Truestone, supra*, 163 Cal.App.3d at p. 723.) The *Truestone* court distinguished *Earhart,* and concluded that the absence of an allegation in Truestone's complaint of a promise by Atonian to pay Truestone for the materials precluded Truestone from recovering on its unjust enrichment claim. In reaching this conclusion, the *Truestone* court reasoned:

> "Truestone, by contrast, alleges unjust enrichment in conclusory terms. It now seeks to rely on an oral promise by Atoian which the complaint does not allege. The allegations of counter declarations may not be used to compensate for defects in the complaint. The counter declarations on a summary judgment motion ' ". . . may not create issues outside the pleadings; are not a substitute for an amendment to the pleadings; and are an ineffective defense to the motion unless they 'set forth facts showing that . . . a good cause of action exists upon the merits.' " [Citation.]' [Citation.]
>
> "A subcontractor, who has no direct contractual relationship with the property owner, may generally not recover on an unjust enrichment theory for benefits conferred on the property. ([*Rogers, supra,* 228 Cal.App.2d at p. 673].) In the *Rogers* case, the defendant property owner, who had paid the contractor for the work before plaintiff

> subcontractor brought the action, was not unjustly enriched. Neither party has referred us to other California authority on this issue, and we have found none. This principle is, however, widely accepted. [Citations.] We conclude that no triable issue of fact is presented by the unjust enrichment action." (*Truestone, supra*, 163 Cal.App.3d at pp. 723-724.)

Similarly, in *Rogers*, the court concluded that a plaintiff subcontractor could not recover from a property owner the costs of equipment that the plaintiff had furnished to a general contractor, which the general contractor used in a construction project on the owner's property, because of the lack of privity between the owner and the subcontractor. (*Rogers, supra*, 228 Cal.App.2d at p. 673 ["in the absence of a contractual privity a person in such a position as plaintiff cannot recover"].) In rejecting the subcontractor's argument that the defendant owner would be unjustly enriched if the subcontractor were not allowed to recover, the *Rogers* court stated that the subcontractor had alternative remedies, including exercising his lien rights on the property and pursuing an action against the general contractor, "with whom he stood in contractual privity." (*Id*. at p. 676.)

The holdings in *Truestone* and *Rogers* are premised on the lack of a "direct contractual relationship" between the subcontractor and the owner. (*Truestone, supra*, 163 Cal.App.3d at pp. 723-724.) In this case, in contrast, the trial court found that there "was a direct contractual relationship between Farwest and [Casteen]. . . ." In finding that Casteen and Farwest had a "direct contractual relationship," it is clear that the trial court was referring to the existence of a relationship that would support a finding of an *implied* contract sufficient to support a quantum meruit claim, and not to an actual

contract, since the trial court specifically found that "there was no contract between plaintiff and Farwest."[13]

Defendants also argue that "the compensation Casteen seeks from Farwest was the subject of, and was governed by, its [s]ubcontract with Crane." Defendants note that Casteen sought compensation from Crane for the cost of replacing the trusses by way of Potential Change Order 19, that Casteen recorded a mechanics lien on which it listed Crane as the party to whom it had furnished material, and that Casteen attempted to recover those costs from Crane in litigation. However, there is nothing in *Truestone* or *Rogers*, nor in any other authority cited by the defendants in support of this argument, that supports the proposition that a subcontractor may not pursue contractual remedies against a general contractor based upon the contract between the subcontractor and the general contractor, while also seeking quantum meruit relief against the owner, based upon an implied contract between the subcontractor and the owner.

Accordingly, we reject defendants' argument that Casteen's quantum meruit action against Farwest is precluded as a matter law, or that it is precluded by Casteen's subcontract with Crane, pursuant to *Truestone* and *Rogers*.

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13 In its *reply* brief, defendants claim "Casteen has failed to establish a 'direct contractual relationship,' between Casteen and Farwest." (Formatting omitted.) We need not consider this argument, since defendants raise it for the first time in reply, without having made any showing of good cause for failing to raise the argument in their opening brief. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [" ' "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. . . ." ' "].)

(ii) *Casteen presented substantial evidence that it intended to benefit Farwest by replacing the trusses, and that Casteen and Farwest both expected that Farwest would compensate Casteen for the cost of the replacement trusses*

Defendants claim that Casteen failed to present evidence that it intended to benefit Farwest by replacing the trusses on the Project. Defendants also claim that Casteen failed to present evidence that Casteen and Farwest expected that Farwest would compensate Casteen for the cost of such replacement trusses.

As noted above, in order to prove its quantum meruit claim, Casteen was required to demonstrate "that the [goods] rendered were *intended to . . . benefit* the defendant." (*Day, supra,* 98 Cal.App.4th at pp. 248-249.)[14] Further, because quantum meruit relief is available only under "circumstances disclosing that [the goods] were not gratuitously rendered," the record must contain evidence that Casteen provided the replacement trusses "under some understanding or expectation of both parties that compensation therefor was to be made [Citations]." (*Huskinson, supra,* 32 Cal.4th at p. 458.)

Defendants initially claim that, pursuant to Code of Civil Procedure sections 632 and 634, this court may not infer that the trial court found that Casteen intended to benefit Farwest by ordering the replacement trusses or that Casteen and Farwest expected that Farwest would compensate Casteen for the costs of such replacement. Defendants maintain that the trial court failed to provide specific findings on these

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14 Although in this quotation the *Day* court referred to "services" rendered, the *Day* court acknowledged that a quantum meruit claim may be used to recover the reasonable value of goods provided to a defendant. (*Day, supra*, 98 Cal.App.4th at p. 249 [" ' "The idea that one must be benefited by the *goods* and services bestowed is thus integral to recovery in quantum meruit," ' " italics altered].)

issues, notwithstanding the defendants' request that the court make such findings in their objections to the trial court's tentative statement of decision.

Code of Civil Procedure section 632 requires that a trial court "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." Code of Civil Procedure section 634 provides in relevant part, "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . prior to entry of judgment . . . it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue."

In its statement of decision, the trial court stated:

> "There is substantial credible evidence that Mr. Jack acting for Farwest wanted the trusses changed after the project started and this is what he and Farwest received. Mr. Casteen and Mr. Soden were very credible on this issue. By contrast, the court did not find Mr. Jack credible on this issue at all. Plaintiff ended up paying for these trusses in addition to the prior materials. Thus, plaintiff suffered a det[ri]ment and defendant received a benefit. Similarly, as to the delay damages, plaintiff competently established it had to expend funds over and above the contract price to complete the job because of truss changes and other delays, while defendant benefited from the completion of the job. Thus, plaintiff is entitled to recover under the theory of quantum meruit."

This portion of the trial court's statement of decision sufficiently indicates that the court found that Casteen intended to benefit Farwest by replacing the trusses, and that it did so at Farwest's behest. With respect to the questions of whether the trusses were gratuitously provided and whether Casteen and Farwest expected that Farwest would

compensate Casteen for the cost of replacement trusses, the only disputed issue at trial was whether Casteen provided the replacement trusses pursuant to its subcontract with Crane, or pursuant to a separate request by Farwest. The trial court's findings that Casteen replaced the trusses at Farwest's request and that Casteen "ended up paying for the trusses in addition to the prior materials," is therefore sufficient to indicate that the trial court found that Casteen did not gratuitously provide the replacement trusses and that both parties expected that Farwest would compensate Casteen for such provision. We conclude that the trial court adequately indicated in its statement of decision that Casteen and Farwest expected that Farwest would compensate Casteen for the costs of such replacement. We therefore reject the defendants' argument that the trial court's statement of decision required clarification pursuant to Code of Civil Procedure section 634 because it did not "resolve a controverted issue," or was "ambiguous. . . ."

We must next consider whether Casteen presented substantial evidence both that in replacing the trusses, it intended to benefit Farwest, and that Casteen and Farwest expected that Farwest would compensate Casteen for the costs of such replacement. (*Central Valley General Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 513 ["Under the general rules applicable to a trial court's statement of decision, an appellate court . . . applies the substantial evidence standard to findings of fact"].) In determining whether the record contains substantial evidence to support such findings, we apply standard of review outlined in part III.A.3.b.ii., *ante*.

Casteen presented substantial evidence that Jack, Farwest's representative, rejected a set of trusses that conformed to both the bid set and the permitted set of plans for the

Project, and that Casteen had the trusses manufactured in reliance on a series of shop drawings that Farwest's architect had approved. In rejecting the trusses, Jack stated that they did not include enough vaulted ceiling trusses. Casteen presented evidence that immediately after he rejected the trusses, Farwest produced a handwritten ceiling plan that depicted the vaulted ceilings. Ellis testified that Jack assured Ellis that Jack would pay for the cost of the replacement trusses. Casteen subsequently authorized the manufacture of the replacement trusses, and provided the replacement trusses to Farwest. This constitutes substantial evidence that Casteen intended to benefit Farwest by replacing the trusses on the Project, and that both Casteen and Farwest expected that Farwest would compensate Casteen for the costs of the replacement trusses.

4. *The trial court must recalculate the amount of damages to which Casteen is entitled on its quantum meruit claim*

The trial court entered judgment against Farwest on Casteen's quantum meruit claim in the principal sum of $88,238. The precise amount that the trial court awarded Casteen for delay damages, and the amount the court awarded Casteen for its costs in replacing the trusses, is not entirely clear.[15] On remand, the trial court must recalculate the amount of damages to which Casteen is entitled on its quantum meruit claim, in light

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15 At trial, Ellis testified that Casteen was owed a total of $90,238.08 on outstanding invoices, but that Casteen was expecting to give Farwest a credit of approximately $2,000 for work that Casteen did not complete. It appears that the trial court based its damage award of $88,238 on this testimony. The record is not clear as to the reason or the $6,100.70 difference between the trial court's damage award ($88,238) and the total amount Casteen sought by way of its two potential change orders ($94,338.70). On remand, the trial court must subtract from its damage calculation any damages associated with the delay damages, and should clearly state the basis for its award.

of our conclusion that Casteen is not entitled to delay damages. The trial court shall enter a new judgment accordingly.

B. *The trial court must enter a new judgment on Casteen's release bond claims in accordance with its recalculation of the amount of damages to which Casteen is entitled*

The trial court 's statement of decision provides that Casteen is entitled to judgment against Farwest and ACIC on Casteen's release bond claims. The court's statement of decision makes clear that defendants' liability on the release bond claims is premised entirely on Farwest's liability to Casteen on Casteen's quantum meruit claim.[16] Accordingly, the trial court entered judgment against Farwest on Casteen's quantum meruit claim in the principal sum of $88,238, and against defendants on Casteen's release bond claims in the principal sum of $88,238.

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16 In its statement of decision, the trial court stated, "For the first time, during objections to the court's tentative decision, [Casteen] argued the finding of the court that Farwest owed [Casteen] money on the quantum meruit theory would also support a finding for [Casteen] under the bond claims against Farwest and ACIC." In a footnote in their opening brief, defendants note the procedural posture by which the trial court found them liable on Casteen's release bond claims, but do not offer any argument that it was improper for the court to revise its tentative decision in such a manner. Defendants are thus not entitled to reversal of the release bond claims on this ground.

Defendants also assert that Casteen did not name Farwest as a defendant in its release bond claims. However, Farwest does not present any argument that it is entitled to reversal on this ground. Further, although Casteen did not name Farwest as a defendant in the captions of the causes of action in the operative complaint, the body of Casteen's mechanics' lien claim and its stop notice claim each state, "FARWEST . . . as principal[] of said bond . . . [is] bound to pay CASTEEN . . . ."

In part III.A., *ante*, we concluded that the trial court erred in awarding Casteen delay damages on its quantum meruit claim and stated that, on remand, the trial court must recalculate the amount of damages to which Casteen is entitled on this claim, in light of our conclusion. Given the fact that defendants' liability on Casteen's release bond claims is premised entirely on Farwest's liability on Casteen's quantum meruit claim, on remand, the trial court must also recalculate the damages on Casteen's release bond claims so as to equal the damages that the trial court determines Casteen is entitled to on its quantum meruit claim.[17]

IV

DISPOSITION

The trial court's award of delay damages to Casteen on its quantum meruit claim against Farwest is reversed. The trial court's award of damages to Casteen for the costs of replacement trusses on its quantum meruit claim against Farwest is affirmed. The trial court's determination that Casteen is entitled to recover delay damages on its release bond claims is reversed. The trial court's determination that Casteen is entitled to recover against defendants damages for the replacement of trusses in the Project on its release bond claims is affirmed.

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[17] In light of our conclusion, we need not consider defendants' claim that the trial court's judgment on Casteen's release bond claims must be reversed because delay damages may not be secured by either a mechanics' lien or a stop notice as a matter of law.

The matter is remanded to the trial court with directions to recalculate the amount of damages to which Casteen is entitled pursuant to its quantum meruit and release bond claims, in accordance with our directions in parts III.A. and III.B., *ante*, and for any further necessary proceedings. Each party is to bear its own costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.